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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Views and comments received from States on the note and revised draft basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law

Report of the Secretary General

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INTRODUCTION

1. At its forty-eighth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its resolution 1996/28, decided to transmit the revised draft basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and *international* humanitarian law prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven to the Commission on Human Rights for its consideration. The Sub-Commission also requested Mr. van Boven to prepare a note taking into account the comments and observations of the working group and of the Sub-Commission. These texts are contained in document E/CN.4/1997/104.

2. In its resolution 1997/29, the Commission on Human Rights invited the Secretary-General to request all States to submit their views and comments on the note and revised text of the basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law contained in document E/CN.4/1997/104. Pursuant to that request, the Secretary-General addressed requests for any such views and comments to all Governments in June 1997.

3. The present report sets out the views and comments received from the following States: Chile, Croatia, Germany, Japan, Philippines and Sweden.

4. In resolution 1997/29 the Commission also expressed its appreciation to States that had provided information on the matter to the Secretary-General and requested those that had not yet done so to provide information on legislation already adopted, as well as that in the process of being adopted, relating to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. The Secretary-General was requested to prepare an additional report on the basis of the replies received from States for submission to the Commission on Human Rights at its fifty-fifth session in 1999.

5. Many of the views and comments set out in the present report make specific drafting suggestions and/or comments on particular principles and the wording used. For ease of reference, the full text of the draft basic principles as proposed by the Special Rapporteur has therefore been included as an annex to the report.

VIEWS AND COMMENTS RECEIVED FROM STATES

CHILE

[Original: Spanish]
[7 October 1997]

1. The Government of Chile thanks the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Theo van Boven, for his dedicated efforts in preparing the set of basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights. The Government attaches great importance to this issue and therefore hopes that the Commission on Human Rights will keep the basic principles under consideration and that they will be adopted by the international community as a general standard.

Extension of the scope of application of the basic principles and guidelines

2. By deleting the word [gross], included in square brackets in the title of the document, the draft proposed in document E/CN.4/1997/104 fundamentally changes the scope of application of the basic principles and guidelines. Removal of the word "gross" results in the extension of the scope of application of the basic principles and guidelines to include all violations of human rights and international humanitarian law, regardless of the type of right violated or the nature of the violation.

3. Without prejudice to our agreement with the principle that the victims of all violations should have the right to reparation and that the basic principles and guidelines should therefore be universally applicable, it is important to realize that this is a fundamental change since the words "gross violations" 1/ or "grave violations" 2/ have been used throughout the process which has culminated in the draft which we have before us. Only the most recent of the Commission's resolutions on the matter broadens the scope of application by placing the word "gross" in brackets for the first time. 3/

Need to explain what is meant by gross violations of human rights and international humanitarian law and by crimes under international law

4. If it is decided to broaden the scope of application of the basic principles and guidelines to include all violations, and all the more so if that alternative is rejected, it would seem essential for the document to explain what is meant by gross violations of human rights and international humanitarian law, which constitute crimes under international law. If the former Special Rapporteur's proposal is rejected and the area of application of the set of basic principles and guidelines is restricted, this definition will be necessary in order to delimit that area. If it is decided to generalize their application, a definition will, again, be needed since some of the basic principles and guidelines (the second sentence of clause 2, the second paragraph of clause 5 and the second sentence of clause 9) apply only to gross violations.

5. The final report of the Special Rapporteur (E/CN.4/Sub.2/1993/8) contains abundant material on which to base a definition of gross violations

of human rights and international humanitarian law and crimes under international law for the purposes of application of the set of basic principles and guidelines or, where appropriate, the specific provisions mentioned.

Need to specify the type of situation which calls for adoption of the special measures mentioned in clause 7 of the draft

6. Clause 7 of the draft states that States have the duty to adopt "special measures, where necessary" for the purpose mentioned therein.

7. It is clear from its wording that clause 7 does not refer to all situations in which the State might be required to make reparation, but to very special situations which call for such measures. The purpose of clause 7 would not appear to be to require States to adopt special measures in cases of occasional violations, where it would be sufficient to impose on the State the duties described in other provisions of the draft under consideration, which impose obligations similar to those stated as the purpose of the special measures mentioned in clause 7. In fact, clauses 2, 5, 11 and 13 already call for prompt and effective reparation to eliminate or remedy the consequences of the damage incurred.

8. The requirement that reparation shall render justice would be met by clause 15 (b) (Verification of the facts and disclosure of the truth), (c) (Restoration of the dignity, reputation and legal rights of the victim through an official declaration or a judicial decision), (d) (Apology, public acknowledgment of the facts and acceptance of responsibility) and (e) (Judicial or administrative sanctions against persons responsible for the violations). The objective of avoiding the commission of further violations through prevention and dissuasion is dealt with in clause 15 (h).

9. Again, the requirement that reparation shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition is deducible from clauses 13 (compensation), 14 (rehabilitation) and 15 (satisfaction and guarantees of non-repetition).

10. Perhaps the only objective of the special measures mentioned in clause 7 which is not repeated elsewhere in the list of provisions is the statement that reparations shall be proportionate to the gravity of the violations and the resulting damage, a condition which could be included in other provisions, such as clause 2 or clause 13, which deal with reparation. Moreover, confining to "where necessary" the principle that reparations must be proportionate to the gravity of the violations and the resulting damage would exclude the requirement of proportionality in the case of other violations which do not constitute a situation requiring special measures.

11. It seems necessary to define or describe the situations where States would have the duty to adopt special measures, in certain cases. The ambiguous statement that they must be adopted where necessary leaves the decision as to whether special measures are called for to the judgement of the State in question.

12. Situations which by their nature require the adoption of special measures should be defined, in the words of Economic and Social Council resolutions 1235 and 1503, as those which reveal a consistent pattern of gross and reliably attested violations of human rights.

13. The practical application by the Commission on Human Rights of the above-mentioned recommendations offers an adequate basis for the definition which we have recommended as necessary or appropriate.

14. Generally speaking, such situations have occurred in States which have institutionalized the abolition, restriction or holding in contempt of fundamental rights as an official policy which is executed by State agents or persons in State service. These are precisely the situations which, usually upon the demise of the authoritarian regime that institutionalized them, require the adoption of special measures by the democratic system which has replaced it. In fact, it is precisely because of the institutionalized repression of dissidence as a means of consolidating an authoritarian regime that the violation of human rights in these situations is usually of a massive and clandestine nature which impedes or significantly hinders attempts to establish the circumstances in which the violations occurred and, as a result, the identity of those directly responsible and their position as State agents or persons in State service, a relationship of subordination which must be established in order to assign responsibility for reparation to the State in accordance with that State's own domestic legislation.

15. In such situations, the adoption of special measures is essential if the following goals, among others, are to be met:

(a) Prompt establishment and broad public dissemination of the truth about what happened in regard to human rights violations during the preceding regime. Generally speaking, the legal machinery, especially as operated by State judicial bodies, has been ineffective in investigating violations at the time of occurrence. The special measures may consist in entrusting this responsibility to non-judicial bodies or committees allowed greater latitude than the courts in weighing the evidence for violations and establishing, if not the identities of the violators, at least their links to the State;

(b) Development of policies for indemnification and rehabilitation of victims and their families, as a State responsibility, including the creation of a public fund to compensate victims or their families;

(c) Suspension of statutes of limitation for criminal and civil actions for compensation in respect of harm incurred during the period in which the victims or their families were effectively denied such remedies.

16. The known cases of special measures of reparation, such as Argentina, Brazil and Chile, have all involved trials for this type of human rights violation.

Need to establish the State's direct financial liability

17. The sentence which follows the heading "forms of reparation" and precedes the description of the various types of reparation states that

reparations must be "provided in accordance with the law of every State". Most of the forms which reparation may take, enumerated in clauses 11 et seq., are by their nature a liability of States which must discharge them directly with public funds or resources. However, depending on the provisions of domestic law, the State may or may not have direct liability with regard to compensation for economically assessable damage, mentioned in clause 13.

18. National law systems have various ways of regulating the State's liability for illicit acts, whether criminal or civil, committed by its officials or agents. Under some legal systems, States have joint and several liability: the victim may claim full, direct financial compensation from the State for harm incurred. Under others, States have secondary liability and the victim may claim compensation from the State only if it cannot be obtained, in whole or part, from those who committed the offence. 4/

19. The second alternative, which should be avoided, obliges victims to seek compensation first from those responsible for the violation. Only if the latter have insufficient financial resources can the State be required to discharge the obligation.

20. Because the draft basic principles and guidelines make this a matter for domestic law, State liability for financial compensation may be of either type.

21. It seems appropriate to include in the set of basic principles and guidelines a specific provision establishing the State's immediate, direct liability for compensation, without prejudice to its right to attempt to recover from the offenders the amount paid.

On the statute of limitations

22. Clause 9 of the draft under consideration sets out two principles concerning the statute of limitations.

23. The first sentence states that statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights or international humanitarian law. The English original is probably clearer than the Spanish translation, which reads, "La prescripción no sera aplicable"; it would be clearer, at least in Spanish, to say that "los plazos de prescripción se interrumpirán durante ...". This sentence rightly makes no distinction between statutes of limitation applicable to criminal and civil actions or between limitations applicable to criminal actions and those applicable to penalties.

24. The second sentence of clause 9 states that "civil claims" relating to reparations for gross violations of human rights and international humanitarian law shall not be subject to statutes of limitations. There seems no reason to limit the non-applicability of statutory limitations to civil claims for reparations. On the one hand, such a limitation would raise doubts as to its applicability in cases where a claim for reparation resulting from an offence is civil in nature but can be lodged during a criminal trial and, on the other, it seems inappropriate to propose the non-applicability of statutory limitations in civil and not criminal cases, leaving unmet the

obligation to prosecute and punish cases of serious violations, mentioned in the last sentence of clause 2 and in clause 15 (c), merely because of the passage of time.

Other differences between the revised draft basic principles and guidelines (E/CN.4/Sub.2/1997/104) and the previous text (E/CN.4/Sub.2/1996/17)

25. It is proposed that wherever humanitarian law is referred to it should be qualified as "international"; this is a necessary clarification of the provisions in question.

26. In the last sentence of clause 3, dealing with conflicts between international and national norms, the replacement of the words "shall be applicable" in the previous text by the words "will be made applicable" gives clearer emphasis to the need to accord precedence to the norm providing the higher degree of protection.

27. In clause 6, while the clarification that the direct victims in question are the victims of "violations of human rights and international humanitarian law" does not constitute a major change, it is an improvement over the previous wording of this provision.

28. Lastly, in clause 6 the previous draft states that reparation may be claimed by "groups of persons connected" with the victim. The text under consideration rightly specifies that the connection must be a close one.

CROATIA

[Original: English]
[19 August 1997]

1. The Republic of Croatia takes this opportunity to express its support for the elaboration of the draft basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and *international* humanitarian law and the work undertaken by the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in respect of the preparation of the draft.

2. While the Republic of Croatia expresses its general satisfaction with the revised text, it should like to present some comments, and in that way to make its contribution to the drafting process.

3. In respect of the paragraph 5, second sentence concerning the providing of universal jurisdiction "over gross violations of human rights and *international* humanitarian law which constitute crimes under international law", the Republic of Croatia is of the opinion that such provision contains somewhat unclear reference to the character of the crimes over which universal jurisdiction is to be applied. While it is relatively common that States envisage in their legislation universal jurisdiction in respect of certain gross violations of human rights, even if such jurisdiction is not expressly required by relevant international instruments, it should be noted that in respect of the rules of international humanitarian law the Geneva Conventions of 1949 and Additional Protocol I of 1977 provide for universal jurisdiction

over grave breaches of the Geneva Conventions and the Protocol. In respect of the violations of the Conventions and Protocol I other than grave breaches, there is neither the obligation of inclusion of such crimes in the national legislation nor the establishment of universal jurisdiction over such violations. On the other hand, the reference to "gross violations of *international* humanitarian law" seems to be somewhat imprecise, thus opening questions as to the scope of the applicability of universal jurisdiction over violations of international humanitarian law (i.e. whether it refers solely to grave breaches or to other violations as well).

4. In order to clarify the scope of the above-mentioned provision calling for the establishment of universal jurisdiction over gross violations of human rights, the Republic of Croatia proposes that such provision should refer to "gross violations of human rights which constitute crimes under international law and grave breaches of the Geneva Conventions of 1949 and Additional Protocol I of 1977".

5. In respect of the paragraph 6 concerning the question of reparation for the victims of violations of human rights and international humanitarian law and related persons, the Republic of Croatia is of the opinion that the provision enabling the immediate family, dependants and other persons or groups of persons closely connected with the direct victim to claim reparation along with the direct victim is praiseworthy, but fails to regulate the order of precedence of such claims.

6. It is clear that the right to claim reparation for violations of human rights and international humanitarian law should be given primarily to the direct victim; in cases where the direct victim is unable to claim or precluded from claiming reparation, such right should be enjoyed by the descendants of the direct victim, and subsidiarilly to the persons closely connected with the direct victim. The Republic of Croatia is therefore of the opinion that the elaboration of the order of precedence in which such claims could be filed shall depend on clarification of the provision concerning the right to reparation, as well as the establishment of legal certainty in respect of the right to claim reparation for violations of human rights and humanitarian law.

GERMANY

[Original: English]
[19 September 1997]

1. The Federal Government welcomes and supports the aims pursued by resolution 1997/29. For this reason, the Federal Government was amongst those introducing this resolution. In the domestic field the Federal Government has, over the past years, particularly tried to grant reparation and rehabilitation to the numerous victims of human rights violations in the former German Democratic Republic. The Federal Government informed the Centre for Human Rights of details of these measures in a note dated 11 September 1995.

2. The draft basic principles and guidelines take up the fundamental concerns of resolution 1997/29 and form a system, the details of which have

been very well elaborated, of conceivable instruments and other measures. Without wanting to question the serious concern of the author of the principles and guidelines, in the sense of wishing to provide human rights protection as effectively as possible, it must be said that in the Federal Government's view the instruments and measures described in the basic principles and guidelines are hardly amenable to application by the State in respect of a large number of affected persons. The Federal Government has considerable doubts whether full restitution, compensation or rehabilitation of persons affected by violations of human rights can constitute a realistic goal. Despite the fact that it is made clear in the preliminary remark to paragraphs 12 et seq. of the basic principles and guidelines that reparations may take any one or more of the forms mentioned, the list as a whole creates the impression that such instruments or measures usually have to be provided cumulatively. Such an impression may be apt to foster a negative attitude towards the basic principles and guidelines on the part of Member States supporting resolution 1997/29.

3. On the other hand, the draft basic principles and guidelines deserve special praise for itemizing, under paragraphs 15 and 16, the sustained treatment of human rights violations as well as the necessary sanctions and preventive measures. This makes it clear that human rights violations must not only entail satisfaction for the victims but also consequences for those who are politically responsible.

JAPAN

[Original: English]
[23 September 1997]

Legal personality of an individual under international law

1. It is generally understood that stipulation of the rights and duties of an individual in international agreements is not enough to ensure that he or she is a subject under international law. For an individual to be a subject under international law, existence of specific international procedures available to him or her to exercise his or her rights stipulated in international agreements is essential. This is also true in the field of human rights and "international humanitarian law", though it is not clear what "international humanitarian law" means concretely. In Mr. van Boven's text, he asserts the duty of a State to adopt special measures (paragraph 7) and to pay reparations to those who are not direct victims (paragraph 6) on the premise that a State has the duty to pay reparations to victims of human rights violations, but the reasons and grounds of this duty under international law are not clear.

Adjustment to the legal systems and customs of each State to protect human rights

2. The human rights stipulated in the existing international standards, such as the International Covenants on Human Rights, including the "right to reparation", are protected internally according to the basic principles of international law, and this is primarily a matter of the domestic policy of

each State. In fact, States have different legal systems to protect human rights and, therefore, the actual implementation of these systems varies from one State to another.

3. Effective establishment of a new international standard to promote human rights always requires that it has genuine international applicability, that it is acceptable to various legal systems in the world, and that it contributes to the promotion of human rights through those legal systems. Therefore, as in other cases, in drafting the basic principles and guidelines a careful examination of their necessity and effectiveness from this viewpoint has to be undertaken. It is inappropriate to require each State to take uniform measures according to the same rule without considering the differences in the unique legal systems of the different States. The Government of Japan considers that paragraph 2 of the draft is problematic in this respect.

4. The Government of Japan appreciates the significance of such measures as reparation to victims, investigation and prosecution of perpetrators, and disclosure of information. Nevertheless, when considering whether to establish international standards on those measures, one must fully take into account the differences between various legal systems. When considering paragraph 6 (reparation claimed collectively), paragraph 7 (standard of reparation), paragraph 9 (statutes of limitations), paragraph 12 (forms of reparation) and paragraph 15 (investigation, sanctions), this point of view is indispensable. (For example, statutory limitations on both criminal prosecution and civil responsibility are adopted in many States for many reasons; for example, it is very likely that evidence would have been scattered and lost in the years since a case occurred. Similarly, every State has its own institutions to decide whether a particular suspect should be prosecuted or not. In Japan, even if a suspect apparently has committed a crime, a public prosecutor is allowed not to institute a prosecution, taking into account the gravity of the offence and the circumstances under which the offence was committed, etc.)

Crimes under international law

5. There is no common understanding among States of what act constitutes "crimes under international law". It has been a problem from the point of the established principle of nulla poena sine lege (No punishment without law). It is also inappropriate under present circumstances to establish universal jurisdiction over these crimes (paragraphs 2 and 5).

Disclosure of information and protection of privacy, etc.

6. Primarily with regard to paragraph 10, the Government of Japan understands the role that disclosure of information certainly plays in protecting human rights. Nevertheless, it should be understood that disclosure of information is restricted from the point of protection of individual privacy, as well as proper investigation and trial.

PHILIPPINES

[Original: English]
[30 September 1997]

1. The Government of the Philippines takes this opportunity to state that it welcomes the Secretary-General's consultation with Member States regarding Commission resolution 1997/29. The resolution, in order to be effective, should urge Governments to consider that the granting of compensation, restitution and rehabilitation is not discretionary, but should be given to victims of human rights violations upon demand and as a matter of right.

2. The Government of the Philippines supports the deletion of the word "gross" before the phrase "violations of human rights" since the term connotes a pattern of human rights violation against a certain number of people or group of people over a period of time, which may result in a situation wherein only the victims of these types of violation are entitled to compensation, restitution and rehabilitation, thereby leaving out those victims of human rights violations which may be considered light or less serious. The Government believes that the act of violation itself, once proven, should be the basis of the claim to a right to restitution, compensation or rehabilitation and not the gravity of its nature.

3. The Government also supports the definition of the term "humanitarian law" with the word "international" to cover all situations of armed conflict.

4. The Government has some reservations on the concept of "universal jurisdiction" stated in the second paragraph of principle 5. While its applicability is acceptable in certain cases, it may in some cases undermine the sovereignty of Member States. There is therefore a need to clearly identify and define the cases covered and the parameters within which the principle of universal jurisdiction may be invoked or applied.

5. While principle 6 defines who may file a claim, the Government has reservations concerning "group of persons *closely* connected with the direct victims" as being among those who may file for compensation. There is no assurance that these groups of persons, no matter how close they are to the victims, will pursue the latters' best interests. It is therefore suggested that another person or an entity, perhaps an accredited human rights NGO, be authorized, in tandem with the first group, to represent victims. Where a claim is made against another State, it is suggested that the victim's Government, through its Ministry of Foreign Affairs, and/or the human rights institutions of the Member State represent the victim.

6. The deletion of the bracketed phrase "[In accordance with international law,]" in principle 7 is fully supported.

7. The retention of the bracketed phrase "[both at home and where necessary abroad,]" in principle 8 is also supported in light of the need, in the case of the Philippines, to disseminate information to overseas Filipino workers and other migrant Filipinos worldwide.

8. In principle 12 referring to "*restoration* of employment or property", there is a need for a qualifying phrase to ensure that the restoration of employment is suitable and not detrimental to the interest of the victims.

9. The enumeration in principle 13 is acceptable.

10. It is suggested that the phrase "and especially officials of accredited or recognized legal assistance groups and/or civil liberties unions" be added in principle 15 (h) (iv).

SWEDEN

[Original: English]
[7 October 1997]

1. The Government of Sweden warmly welcomes the draft revised basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and *international* humanitarian law and wishes to express its deep appreciation of the dedicated work performed by the former Special Rapporteur, Mr. Theo van Boven. Undoubtedly, the issue of reparation for victims of violations of human rights and international humanitarian law is of great importance. It is also an area which is clearly in need of clarifications as to the extent of the responsibility of States. On the whole, the draft constitutes a solid, well-structured instrument for this purpose. However, it contains a few ambiguities that the Government of Sweden wishes to comment on.

General remarks

2. The title of the document indicates that the question of whether the right to reparation should be limited to "gross" violations is under discussion. Whether or not such limitation should be made in the absence of any agreed definition of what constitutes "gross" violations is a question which Sweden would like to see further discussed. It seems, however, reasonable to stress that the right to reparation, as well as the form and degree of it, should depend on the damage inflicted. A possible solution could thus be to clarify that all reparation presupposes damage. At the very least, the criterion of damage should apply to reparation in the form of restitution, compensation and rehabilitation.

3. Sweden strongly supports the proposal in the revised text that the scope of the draft principles be enlarged so as to include international humanitarian law. However, depending on the outcome of the above-mentioned discussion, the terminology used may have to be altered in order to avoid a confusion of already existing terminology and concepts. Hence, should the right to reparation be limited to gross violations, the correct wording under public international law would be: "gross violations of human rights and grave breaches and other serious violations of international humanitarian law". This expression would have to be added in relevant articles throughout the draft.

4. Sweden acknowledges that, due to the variety of the violations/breaches concerned, it is necessary to extend the group of persons entitled to claim

reparation beyond the direct victims. However, the expression "persons or groups of persons closely connected with the direct victims" is vague and may give rise to problems of implementation. Hence, Sweden recommends further discussions on what links to the direct victims these persons or groups ought to have.

Remarks on specific principles

Paragraph 3

5. In order to clarify that there are several methods to transfer international norms into national law, including transformation, and that, regardless of the method used, the norms must be made effective, the first sentence of the article could be rephrased as follows:

> "The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for are defined by international law and must be incorporated or otherwise made effective in national law."

Paragraph 4, compared with paragraphs 6 and 15 (c)

6. In paragraphs 6 and 15 (c) the rights concerned are granted to direct as well as certain indirect victims, whereas in paragraph 4 the right to remedy is restricted to persons claiming to be direct victims. This seems inconsistent and should be altered, either by enlarging the scope of paragraph 4 or reducing the scope of the other paragraphs.

Paragraph 5

7. It follows from paragraph 3 that every State has the duty to make applicable norms of public international law effective in national law. Since the obligation to provide for universal jurisdiction over grave breaches of international humanitarian law is already established under public international law, Sweden recommends that the following sentence be added at the beginning of the second part of the article:

> "To the extent this obligation is not already established under public international law, every State ..."

Paragraph 10

8. Paragraph 10 is ambiguous in two respects. Firstly, it is not clear whether the principle confers upon the State a duty to actively spread relevant information or merely an obligation to provide information upon request. Secondly, the recipient of the information is vaguely defined. "Competent authorities" may be interpreted as implying all sorts of bodies, national as well as international, which *inter alia* may cause great problems of secrecy.

Subtitle "Forms of reparation"

9. The sentence under the subtitle "Forms of reparation", stating that reparations "may take any one or more of the forms mentioned below", is vital insofar as it enables the adaptation of the different forms of reparation to the nature of the violation.

Paragraph 12

10. In order to clarify that reparation in the form of restitution cannot always be provided, the beginning of the first sentence may be rephrased as follows:

> "*Restitution* shall, to the greatest possible extent, be provided to re-establish ..."

Paragraph 15

11. The reference to judicial decisions under paragraph 15 (c) could be interpreted as contravening the fundamental principle of the independence of courts. A Government or other authorities cannot/should not be able to require a certain decision from a court in a certain case. Furthermore, in some countries courts are unable to make general statements with a rehabilitating purpose.

12. In light of the above, the Government of Sweden suggests that paragraph 15 (c) be rephrased as follows:

> "(c) An official declaration restoring the dignity, reputation and legal rights of a victim [and/or of the immediate family, dependants or other persons or groups of persons closely connected with the victim], or a judicial decision having the same effect."

13. Under paragraph 15 (g), the phrase "in history *or school textbooks*" may be replaced by "in history and school textbooks".

Final remarks

14. Finally, it must be taken into account that the relevant draft consists of guidelines and principles not legally binding under public international law. Should the principles without modification be transferred to a convention, some additional problems of implementation may need to be addressed.

Notes

1/ Resolutions 1989/13 and 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities ("violaciones flagrantes"). Resolution 1992/32 of the Sub-Commission ("violaciones manifestas").

2/ Commission on Human Rights document E/CN.4/Sub.2/1996/17 and resolution 1996/35 ("violaciones graves").

3/ Commission on Human Rights resolution 1997/29.

4/ This distinction with regard to the nature of State liability is made in clauses 11 and 12 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Clause 11 establishes that the State has immediate, direct liability when the violation has been committed by a public official or other agent acting in an official capacity.

Annex

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF [GROSS] VIOLATIONS OF HUMAN RIGHTS AND *INTERNATIONAL* HUMANITARIAN LAW*

The duty to respect and to ensure respect for human rights and *international* humanitarian law

1. Under international law every State has the duty to respect and to ensure respect for human rights and *international* humanitarian law.

Scope of the obligation to respect and to ensure respect for human rights and *international* humanitarian law

2. The obligation to respect and to ensure respect for human rights and *international* humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights *and international humanitarian law* and to the duty to prosecute and punish perpetrators of crimes under international law.

Applicable norms

3. The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection *will be made* applicable.

Right to a remedy

4. Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her *human* rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right to access to national and *any available* international procedures for their protection.

5. The legal system of every State shall provide for prompt and effective disciplinary, administrative, civil and criminal procedures so as to ensure readily accessible and adequate redress, and protection from intimidation and retaliation.

Every State shall provide for universal jurisdiction over gross violations of human rights and *international* humanitarian law which constitute crimes under international law.

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* The words in italics reflect additions or changes suggested by the Special Rapporteur. The words in square brackets are suggested for deletion.

Reparation

6. Reparation may be claimed individually and where appropriate collectively, by the direct victims *of violations of human rights and international humanitarian law*, the immediate family, dependants or other persons or groups of persons *closely* connected with the direct victims.

7. [In accordance with international law,] States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. Every State shall make known, through public and private mechanisms, [both at home and where necessary abroad,] the available procedures for reparations.

9. Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights *or international* humanitarian law. Civil claims relating to reparations for gross violations of human rights and *international* humanitarian law shall not be subject to statutes of limitations.

10. Every State shall make readily available to competent authorities all information in its possession relevant to the determination of claims for reparation.

11. Decisions relating to reparations for victims of violations of human rights *or international* humanitarian law shall be implemented in a diligent and prompt manner.

Forms of reparation

Reparations, *to be provided in accordance with the law of every State*, may take any one or more of the forms mentioned below, which are not exhaustive, viz:

12. Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights *or international* humanitarian law. Restitution requires, inter alia, restoration of liberty, family life, citizenship, return to one's place of residence, *and restoration of* employment *or* property.

13. Compensation shall be provided for any economically assessable damage resulting from violations of human rights *or international* humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity;

(e) Costs required for legal or expert assistance, *medicines and medical services.*

14. Rehabilitation shall be provided and will include medical and psychological care as well as legal and social services.

15. Satisfaction and guarantees of non-repetition shall be provided, including, as necessary:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth;

(c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons closely connected with the victim;

(d) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(e) Judicial or administrative sanctions against persons responsible for the violations;

(f) Commemorations and paying tribute to the victims;

(g) Inclusion in human rights training and in history *or school* textbooks of an accurate account of the violations committed in the field of human rights and *international* humanitarian law;

(h) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting *persons in* the legal profession and human rights defenders;

(v) *Conducting and strengthening,* on a priority *and continued* basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.